service and established a laundry business in London. In the same year she married a French refugee who was flying from France at that time to escape prosecution for some offense. They lived together for some years in England and then he and his wife parted company, she remaining in England, he returning to France. While matters stood thus she died, leaving no will except the old one she had made as a spinster. The point was whether that will had been revoked by her marriage. The majority of the court took the view that the husband was domiciled in England at the date of the marriage and held that the wife's will was thereby revoked; but Lord Lindley, M. R., differed from his two colleagues as to the husband's domicil at that time, locating it in France. He was therefore of the opinion that the French law should control, under which the will was not revoked by the marriage. But all agreed that it was the law of the husband's domicil at that date, not that of the wife's prior to the marriage, which must be applied.

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THE ANOMALOUS DOCTRINE OF PUNITIVE DAMAGES.—The exceptional or anomalous doctrine of allowing punitive damages in tort actions, although at variance with the general rule of compensation which is undoubtedly the central idea of the law of damages, has been set forth and imbedded in the great majority of the American cases upon this subject.[1] But this doctrine is not only inconsistent with the central principle of the law of damages—therefore logically wrong—but also seems to be contrary to equity and justice. The principle owes its origin to the old rule that the jury were the sole judges of the damages.[2] Then, as now, when a wrong was accompanied by circumstances of aggravation, the jury was prone to return a verdict for large damages which the court was powerless to set aside. The early cases amount to no more than a refusal to set aside such verdicts;[3] but from the intemperate language sometimes used by the judges in justifying these verdicts, the doctrine of exemplary damages sprang up, well characterized as "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine."[4] The principle was also confused with that allowing compensation for mental suffering, the circumstances of aggravation which would justify exemplary damages being generally such as would naturally cause mental suffering.[5] Under the modern

[1] SEDGW., DAM., § 353.
[2] SEDGW., DAM., § 354.
[3] Huckle *v.* Money, 2 Wils. 205; Beardmore *v.* Carrington, 2 Wils. 244; Merest *v.* Harvey, 5 Taunt. 442.
[4] HALE, DAM., 303.
[5] Wiggin *v.* Coffin, 3 Story 1, Fed. Cas. 17, 624. In Fay *v.* Parker, 53 N. H. 342, 16 Am. Rep. 270, Foster, J., said: "If compensation were now understood, as it formerly was to be made for injuries to material substance only, and exemplary damages were now understood as they were formerly, to refer to injuries to the spiritual or mental part of

view, it is the province of the court to determine whether there is any evidence to support an award of exemplary damages and the province of the jury to determine whether or not such damages should be awarded.[6] The amount of exemplary damages is limited only by the sound discretion of the jury, but where the verdict is so excessive as to show passion, prejudice or corruption, the court may set it aside.[7]

In the absence of malice, wanton or willful wrong, or gross negligence, all of which increase the indignation, mortification and mental suffering of a plaintiff, no punitive damages are allowed.[8] Hence a few courts, in awarding damages for mental suffering caused by such elements, have called them punitive damages; but in doing so have insisted that such damages were awarded as compensation,[9] and therefore the term punitive or exemplary damages is a misnomer in such cases, since the generally accepted meaning of exemplary or punitive damages is damages awarded as a punishment, over and above compensation. If the question be simply whether certain elements of damage are to be regarded as compensatory or exemplary, the plaintiff in either event getting the advantage of them, it is a matter but of verbal consequence; but it manifestly becomes a matter of more than verbal consequence if the plaintiff is to receive and the defendant to pay for the same elements of damage twice, once as compensatory and again as exemplary; *a fortiori* it is of more than verbal consequence if the defendant is required to pay for the same thing the third time, by fine on the prosecution of the state.[10] Hence, even in a case in which accord-

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human nature, there would be no trouble or difficulty in the matter; but in the progress of the time these definitions have changed. Compensatory damages now include injuries to the mental and spiritual part of mankind; and this change of definition leaving nothing for exemplary damages, as formerly understood, to operate upon and be applied to, by a very natural mistake the term exemplary has been supposed to refer to criminal punishment for the sake of public example —an idea that was not included in the 'exemplary damages' as formerly understood."

[6] Chicago, etc., R. Co. *v.* Scurr, 59 Miss. 456, 42 Am. Rep. 373; Chillis *v.* Chapman, 125 N. Y. 214, 26 N. E. 308, 11 L. R. A. 784.

[7] Wiggins *v.* Coffin, *supra;* Flannery *v.* Baltimore & O. R. Co., 4 Mackey 111.

[8] Wood *v.* American Nat. Bank, 100 Va. 306, 40 S. E. 931. In Aaron *v.* Southern R., 68 S. C. 98, 46 S. E. 556, it was held that there could be no punitive damages for mental suffering when the plaintiff failed to sustain his charge of wanton and willful wrong.

[9] Ford *v.* Cheever, 105 Mich. 679, 63 N. W. 975. In Doerhoefer *v.* Shewmaker, 123 Ky. 646, 97 S. W. 7, the court said: "Vindictive damages operate it is true by way of punishment but they are allowed, as compensation for the private injury complained of in this action. They are allowed because the injury has been increased by the manner in which it was inflicted. Its object is not to inflict a penalty but to remunerate for loss sustained." This rule, once existing in West Virginia, seems to have been overruled. Claiborne *v.* Chesapeake & O. Ry. Co., 46 W. Va. 363, 33 S. E. 262; Hess *v.* Marinari (W. Va.), 94 S. E. 968.

[10] Fay *v.* Parker, *supra.*

ing to fixed rules of law, exemplary damages are given as compensation—and so the term a misnomer—the court should keenly scrutinize and analyze the elements of damages in order that the defendant shall not pay twice for the same elements of injury, since damages for mental anguish are one of the important elements of modern compensatory damages.

The great weight of authority awards exemplary damages not as compensation to the injured party but as a punishment to the defendant;[11] and in such cases damages for mental suffering and mental pain are actual, not punitive.[12] Damages assessed upon this principle are called exemplary, punitive or vindictive, which terms are usually employed indifferently in describing these damages. In justifying the award of such damages there has been an attempt to distinguish between damages given as a punishment to the defendant and damages given as an example to the community. This distinction between the terms punitive and exemplary was evolved by the courts to escape the fact that double punishment for the same offence was being imposed.[13] But most, if not all, of these cases have since been overruled or the distinction repudiated and the terms exemplary, punitive and vindictive are now held to be synonymous.[14] These terms denote a civil fine imposed upon the defendant on behalf of the public, *a fortiori* at the hands of the state, even though inflicted in the name of an individual, no matter what such a fine may be called.

These cases, allowing exemplary damages in addition to compensatory damages, may be divided into two classes; first, those in which the wrongs committed, although creating liability in tort, are punishable as crimes, and, second, those cases in which the wrong gives rise to civil liability only.

Upon the first class, the authorities are somewhat divided. The objection to allowing the award of punitive damages for the wrong criminally punishable involves the constitutionality of such a rule. Many courts, recognizing this infringement upon the constitution,[15] in that a person is put twice into jeopardy for the same offence, have refused to allow punitive damages in such a case.[16] Other

[11] Milwaukee & St. P. Ry. *v.* Arms, 91 U. S. 489; Parkhurst *v.* Mastiller, 57 Iowa 474, 10 N. W. 864; Cook *v.* Ellis, 6 Hill (N. Y.) 466, 41 Am. Dec. 757.

[12] Young *v.* Gormley, 120 Iowa 372, 94 N. W. 922.

[13] Meidel *v.* Anthis, 71 Ill. 241; Albrecht *v.* Walker, 73 Ill. 69.

[14] Brown *v.* Evans (C. C.), 17 Fed. 912. The distinction in Meidel *v.* Anthis was repudiated in Lowery *v.* Coster, 91 Ill. 182.

[15] The fifth amendment to the Constitution declares: "Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

[16] Faber *v.* Houston, 5 Ind. 322, 61 Am. Dec. 96; Fay *v.* Parker, *supra*. See note in 50 Am. Dec. 770. In Fay *v.* Parker the court said: "Upon the fullest consideration which I have been able to bestow on the subject (referring to the 5th Amend. to U. S. Const.) I am satisfied that it means no more than this—no man shall be twice tried for the same offence." In Faber *v.* Houston, after stating that if the defendant be made to pay punitive damages in this case where the wrong was pun-

courts disregard or fail to recognize the distinction between wrongs merely giving rise to a civil action and those additionally punished as crimes;[17] and hence they allow punitive damages, whether or not the criminal element be present. The reasons for such holdings are few and insufficient. Some of these courts in their opinions make apparent their view as to what the law should be, but feel that they are bound to follow prior decisions; and they, therefore, allow such damages and set forth the rule of *stare decisis* as a valid reason for this inconsistent doctrine.[18] Another reason advanced is the so-called distinction between criminally punishing a person and civilly punishing him, and these courts claim that the clause in the Constitution forbidding one to be twice put in jeopardy for the same offence applies only to double punishment in criminal courts.[19] According to this distinction these courts go so far as to hold that evidence of a prior conviction and punishment in criminal proceedings is not admissible, even in mitigation of damages in the civil action.[20] But it seems that there is a clear case of double jeopardy and that the offender undergoes two punishments at the hands of the state, if proof of criminal punishment is not admissible in bar of punitive damages; and a refusal to admit such proof in mitigation of the civil fine, merely adds to the severity of the law. The same result follows where the wrongdoer is criminally convicted and imprisoned without a right to introduce evidence of a civil fine. It must be remembered that it matters little to the offender what be the form in which he pays the penalty so that he pays but once, and to him it can make no difference so long as the blow must fall, whether it comes from the arm of the civil or the criminal law.

Should an offender be twice prosecuted, twice convicted and twice punished? Must he be made to suffer one of these punishments without any regard for the leading principles obtaining in criminal procedure; will he be deprived of any hope for executive clemency in the civil suit; and if imprisoned will he have to forego his right of *habeas corpus?* Under this principle, which allows exemplary damages for a wrong criminally punishable, a wrongdoer will be deprived of the foregoing privileges and rights when the case is pressed to a civil trial.[21] It seems therefore that this inconsistent

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ishable criminally, he may be punished twice for the same offence, Davidson, J., said: "And though that provision (referring to 5th Amend.) may not relate to the remedies secured by civil proceedings still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more."

[17] Garland *v.* Wholeham, 26 Iowa 185; Brown *v.* Evans, *supra.* Note to Austin *v.* Wilson, 50 Am. Dec. 766.

[18] Parkhurst *v.* Masteller, 57 Iowa 474, 10 N. W. 864.

[19] Brown *v.* Evans, *supra.*

[20] Wheatley *v.* Thorn, 23 Miss. 62; Hoadley *v.* Watson, 55 Vt. 289, 12 Am. Rep. 197. *Contra,* Flanagan *v.* Womack, 54 Tex. 45.

[21] Murphy *v.* Hobbs, 7 Colo. 541, 5 Pac. 119, 49 Am. Rep. 366.

and repugnant doctrine of punitive damages should be cast aside before it becomes hopelessly imbedded in our jurisprudence.

In the second class of cases, on which the authorities are in less conflict, the offender is not subject to a double punishment; nevertheless the punishment inflicted in the tort action is not governed by the principles of criminal procedure, although the great weight of authority insists that punitive damages are awarded as a punishment to the offender for the wrong. The doctrine of proof of guilt beyond a reasonable doubt is replaced by the rule controlling in civil actions, and a mere preponderance in the weight of the evidence warrants conviction.[22] The commonwealth has to prove guilt beyond a reasonable doubt, whereas the plaintiff in a civil suit punishes the offender if he can show a mere preponderance of evidence. If the plaintiff is to receive as benefits these extra damages imposed upon the wrongdoer, he should be made to prove the aggravating circumstances beyond a reasonable doubt. To impose such a task upon the plaintiff who, in his action for compensation must prove only a preponderance of evidence, would be very difficult and impracticable, in that he must make a distinction in his proof to the jury between the two degrees of proof. This difficulty shows the inconsistency of the whole doctrine of punitive damages with the central idea of the law of damages, which law is only applicable in civil cases.

Again, the elementary rules of evidence are disregarded or completely demolished. The defendant may be compelled in the civil suit to testify against himself, as a result of which he may be punished as a criminal by fine upon his own testimony.[23] Furthermore, the constitutional right of exemption from punishment after a pardon by the executive is violated by the imposition of punitive damages. Since the pardoning power is a constitutional power, the exemption of the pardoned criminal is a constitutional exemption. But by the imposition of a fine in a civil action, the executive pardon is ignored, since the remission of the fine is impossible.[24] Lastly, every principle and rule of pleading is violated; the plaintiff may be awarded what he does not ask for in his suit; the defendant is forbidden to aver, by any pleadings, that he has once paid, or been absolved from the payment, to the state of that which the plaintiff has received without asking for; and is punished criminally in a civil suit upon a declaration, neither sworn to nor presented by the grand jury.[25]

Although this rule of allowing punitive damages seems to be established by authority and by reasons of convenience, courts, guided by a conscious effort to enforce equity and justice, and realizing that there is an inconsistency and repugnancy in this doctrine, are still in doubt and undetermined as to the correct status of the doctrine. The late case of *Hess* v. *Marinari* (W. Va.),

[22] Fay *v.* Parker, *supra.*
[23] Fay *v.* Parker, *supra.*
[24] Fay *v.* Parker, *supra.*
[25] Fay *v.* Parker, *supra.*

94 S. E. 968, shows this doubt which prevails in some courts' minds. The plaintiff, who had entered the defendant's store with several companions, on hearing a disturbance in the opposite side of the room, went across the room to investigate. The defendant owner was in the act of commanding his companions to leave and before the plaintiff could get out the defendant struck him repeatedly with a cleaver and the defendant's clerk stabbed him in the back. In an action for assault and battery in which the plaintiff attempted to recover punitive damages, it was held that the plaintiff could not recover. In this case it was said that punitive damages should not be awarded in any case where the amount of compensatory damages is adequate to punish the defendant; and in a case where such compensatory damages are not adequate for the purpose of punishment, only such additional amount should be awarded, as taken together with the compensatory damages will sufficiently punish the defendant. Such a holding makes a change in the generally accepted doctrine of punitive damages. It is apparent that confusion still exists as to this anomalous doctrine. The truth of the words of Judge Foster in *Fay* v. *Parker* is evident: "We have conducted ourselves improperly for so long a time and we have acted improperly because, for a long time we misunderstood what we now understand, namely that we were in error, that on the whole, we prefer to trample under foot the sacredest maxims of the common law rather than sacrifice the pride we feel in our stubborn inconsistency." But instead of adhering to this inconvenient and authoritative rule, there is yet time to break away from it and some courts have done so.[26]

USER BY THE GENERAL PUBLIC AS CONSTITUTING ACCEPTANCE OF AN OFFER TO DEDICATE A HIGHWAY.—There are two kinds of dedication of highways to the public, common law and statutory. The common law dedication merely gives the public the right to pass over the land, while the fee remains in the owner.[1] The fee is often vested in the city in the case of statutory dedication.[2] On questions of statutory dedication the particular statute must be referred to in each instance; and substantial compliance with the terms of the statute is necessary to effect such dedication. But where the dedication fails as a statutory dedication, because of the omission of some formality, it may take effect as a common law dedication.[3]

In order to effect a common law dedication, there must be clear and convincing evidence of an intent to dedicate on the part of

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[26] Exemplary damages are not awarded in Massachusetts, Colorado, Nebraska, Washington and New Hampshire.

[1] Attorney-General *v.* Abbott, 154 Mass. 323, 28 N. E. 346, 13 L. R. A. 251. See LILE, NOTES ON MUN. CORP., 3 ed., p. 15.

[2] Downend *v.* Kansas City, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170.

[3] City of Caruthersville *v.* Huffman, 262 Mo. 367, 171 S. W. 323. See LILE, NOTES ON MUN. CORP., 3 ed., p. 14.